The Kerfuffle Over West Virginia's Taxation of Streaming Services

Sep 01, 2024

Categories:

Blogs
Tax Law Defined™ Blog

Authors:

Craig A. Griffith

In 2021 the West Virginia State Tax Division published a document entitled "Sales and Use Tax for Streaming Services."[1] The one-page publication includes the following description of streaming services:

A streaming service provider is generally a supplier of entertainment (music, movies, video games, etc.) or other content delivered electronically, usually by an internet, satellite or cable connection to the user's computer, television, mobile device, or any other device that can be used to access the content. Streaming services are different than the sales of digital products. A digital product is a specific, identifiable item. For example, a consumer may buy or rent a movie at a specified price for the download and will then have bought or leased the digital product. This publication does not cover sales of digital products, only the sales of streaming services.

When a consumer purchases streaming services, the consumer has generally bought access to curated entertainment content in the streaming service's catalog but has not bought a right to any one specific digital product. [2]

The publication represents the Tax Division's initial guidance regarding the taxation of streaming services, noting that "all sales of streaming services in West Virginia are subject to sales and use tax unless there is a specific exception or exemption outlined under West Virginia law," and advising that "there is no sales tax exemption regarding the provision of streaming services in West Virginia. Accordingly, streaming services are subject to the West Virginia Consumer Sales and Service Tax and Use Tax."[3]

Streaming service companies all began collecting and remitting sales tax, and there is no indication that any streaming service companies disputed the guidance or pursued litigation on the applicability of sales tax to their services.

As this column will explain, West Virginia law necessitated the Tax Division's bright-line differentiation between digital products and services. The column will also discuss the reaction of the Streamlined Sales Tax Governing Board and committees to the Tax Division's guidance.

West Virginia's sales and use tax articles[4] do not define the terms "digital products," "digital audio visual works," "specified digital products," or any other permutation of those terms for purposes of sales and use taxation, and there is no language in any of the articles that subjects digital products to sales and use tax in West Virginia.

West Virginia adopted the Streamlined Sales and Use Tax Administration Act (SSUTAA) in 2002 and became a full member state of the Streamlined Sales and Use Tax Agreement after filing its petition for membership in 2005. However, the West Virginia Legislature has rebuffed attempts to include a definition[5] for digital products under the SSUTAA, let alone subject those products to sales and use tax.

During the West Virginia Legislature's 2008 regular legislative session, a bill was introduced for the purpose of updating the SSUTAA.[6] The bill, as introduced, included a definition of specified digital products that conformed with the definition of that term as found in the 2008 version of the Streamlined Sales and Use Tax Agreement. The definition of specified digital products would have included "digital audio visual works," "digital audio works," and "digital books."[7] Despite the absence of proposed corresponding statutory changes in 2008 that would have expressly subjected digital products to sales and use taxes in West Virginia, the definition of specified digital products, including "digital audio visual works," "digital audio works," and "digital books," was excised from S.B. 596, which passed the Legislature and was signed into law.

Similarly, a bill was passed in 2009 to update SSUTAA definitions, with the term "specified digital products" included in the bill as introduced, but removed from the version that was eventually passed and signed into law.[8] When the Legislature amended W. Va. Code section 11-15B-2 in 2010 and 2012, no attempt was made to define the terms "specified digital products" or "digital audio visual works." Thus, the West Virginia Legislature has opted not to subject "specified digital products" to sales and use tax in West Virginia, and has, on two occasions, refused to define the terms under the SSUTAA. Also, the West Virginia Code does not otherwise subject "electronically transferred" goods to sales and use tax.

West Virginia's taxability matrix that was submitted to the Streamlined Sales Tax Governing Board on July 30, 2020, (the matrix immediately preceding the Tax Division's guidance subjecting streaming service companies to sales and use tax) established that West Virginia does not subject specified digital products to sales tax. The state repeatedly indicated that specified digital products either were not subject to sales tax or were exempt in response to multiple other questions included in the 2020 taxability matrix.[9]

However, the West Virginia State Tax Division amended its taxability matrix in 2021 to reflect the position set forth in TSD 445, "Sales and Use Tax for Streaming Services." The Tax Division's taxability matrix submitted in August 2021 included language stating:

> West Virginia imposes a sales tax on the provision of services. The provision of streaming services is subject to this tax. However, subscription services that provide digital content for permanent use (like a purchase) or less than permanent use (like a rental) are not subject to this tax.[10]

Sensing that more explanation was needed regarding its position on the taxation of streaming service companies, the Tax Division submitted another taxability matrix in September 2021. The September taxability matrix supplemented the language that was included in the prior month's taxability matrix and stated that "West Virginia imposes a sales tax on the provision of services. The provision of streaming services is subject to this tax. However, rentals and similar nonpermanent use of digital audio works are not subject to this tax. If a seller or certified service provider relied on a prior version of the taxability matrix, the State Tax Department will provide relief for failure to collect sales tax on streaming services until November 1, 2021, pursuant to Section 328 of the Streamlined Sales and Use Tax Agreement and W. Va. Code section 11-15B-18 and section 11-15B-36."[11] The additional language addressed any concerns that streaming service companies or certified service providers had regarding the new guidance, since many of these entities had unquestionably relied upon West Virginia's old guidance regarding the nontaxability of digital products and did not collect or remit sales tax on streaming services purchased by West Virginia residents. The Tax Division did the right thing and required collection and remittance of sales tax on streaming services prospectively, beginning November 1, 2021.

Sales Taxation of Services

The Tax Division's decision to couch streaming services as the provision of a service instead of the sale of a specific product was rooted in West Virginia's broad-based taxation of services. In West Virginia, all services are presumed subject to sales and use tax unless an exemption applies.[12] Generally, the only services exempt or excepted from sales tax are professional and personal services, services subject to the control of the public service commission, services by employees for their employer, and services purchased for resale.[13]

The Tax Division determined that provision of streaming services did not qualify under any of the services exempt or excepted from sales tax in reaching its decision to subject those services to sales tax beginning in late 2021.

Streamlined Sales Tax Group's Response to Tax Division Guidance

While the Tax Division's solution to its digital products issue met with virtually no pushback from streaming service companies or consumers, the Business Advisory Council for the Streamlined Sales Tax Governing Board had issues with the path followed by the Tax Division. In a Streamlined Sales Tax Governing Board meeting in 2021 [14], a member of the Business Advisory Council indicated that West Virginia "may not be in compliance with the requirements of the" streamlined sales tax agreement, and the governing board informed the Business Advisory Council that it could submit a petition for review with the Compliance Review and Interpretations Committee, which the Business Advisory Council elected to do. Notably, the Business Advisory Council did not oppose West Virginia's imposition of sales tax on streaming services, only that West Virginia should have addressed the issue through legislation to impose the tax.

The petition was considered by the Compliance Review and Interpretations Committee, which recommended that West Virginia be found out of compliance with the streamlined sales tax agreement. However, the motion to find West Virginia out of compliance failed on a roll-call vote at an October 2022 governing board meeting, with 15 states voting that West Virginia was in compliance and six voting that it was out of compliance.[15]

However, the Business Advisory Council was not done, and it filed a petition for resolution and reconsideration of the governing board's action. A public hearing was conducted by the Compliance Review and Interpretations Committee in March 2023. Various procedural issues were raised by the West Virginia State Tax Division, leading to the committee tabling the procedural issues and creating a workgroup to clarify the procedural issues.[16] While the committee did not determine the issue of whether West Virginia was in compliance with the agreement, it tipped its hand in its decision, noting that "West Virginia was not out of compliance with . . . the Agreement." Instead of definitively deciding the compliance issue, the committee recommended:

that the Governing Board forgo any further analysis or vote in response to the [Business Advisory Council] Petition, in favor of the Governing Board's vote in the October 2022 meetings that found West Virginia not out of compliance with the Agreement, and that it notify the Business Advisory Council and the appropriate West Virginia authorities of its decision.

Ultimately, the Compliance Review and Interpretations Committee, in its "2023 State Annual Compliance Review Report," recommended that West Virginia be found not out of compliance with the agreement, with the recommendation based on a 6-0 vote of committee members.[17]

The full Streamlined Sales Tax Governing Board took the Compliance Review and Interpretations Committee's recommendation under consideration at its November 2023 meeting, with 18 states voting that West Virginia was not out of compliance and only two states voting that it was out of compliance.[18]

However, the matter lives on. Following the vote finding West Virginia not out of compliance, a separate motion was made to find that West Virginia is not out of compliance with the agreement, but that there is a pending issue before the Compliance Review and Interpretations Committee that could change the outcome. Specifically, the pending issue regards the procedural challenges raised by the West Virginia State Tax Division before the committee. Because those challenges were tabled at the March 2023 meeting, the motion of the chair of the Compliance Review and Interpretations Committee recognized that a ruling on the procedural issues could affect the ruling that West Virginia was not out of compliance. To date, there is no indication that the issue has been revisited by the committee, and based on the history of the matter, it seems unlikely that the full governing board would ever find West Virginia to be out of compliance with the agreement.

**This article was originally published in Tax Notes State, vol. 113, Aug. 12, 2024.*

---

[1] West Virginia Tax Division TSD-445, "Sales and Use Tax for Streaming Services" (last revised in May 2023).

[2] *Id.* (emphasis added).

[3] *Id.* (emphasis added).

[4] W. Va. Code sections 11-15-1 et seq. (Consumer Sales and Service Tax); W. Va. Code sections 11-15A-1 et seq. (Use Tax); and W. Va. Code sections 11-15B-1 et seq. (SSUTAA).

[5] *See* W. Va. Code section 11-15B-2 (West Virginia's Streamlined Sales and Use Tax definitions).

[6] S.B. 596, 2008 Leg., 78th Sess. (W. Va. 2008).

[7] S.B. 596, as introduced, defined "digital audio visual works," "digital audio works," and "digital books" using language virtually

identical to the current definition of those terms under Streamlined Sales and Use Tax Agreement, Appendix C (Library of Definitions), Part II (amended through May 20, 2021).

[8] H.B. 2999, 2009 Leg., 78th Sess. (W. Va. 2009).

[9] *See* Streamlined Sales Tax Governing Board, "West Virginia Taxability Matrix: Library of Definitions" (July 30, 2020). West Virginia Taxability Matrices both before and following the 2020 version consistently include language demonstrating that the sale of digital audiovisual works are not subject to sales and use tax in West Virginia.

[10] Streamlined Sales Tax Governing Board, "West Virginia Taxability Matrix: Library of Definitions" (Aug. 2, 2021).

[11] *See* Streamlined Sales Tax Governing Board, "West Virginia Taxability Matrix: Library of Definitions" (Sept. 20, 2021).

[12] *See* W. Va. Code sections 11-15-8 and 11-15A-2(a).

[13] *See* W. Va. Code sections 11-15-8, 11-15-2(b)(18) and 11-15B-2(b)(56). *See also* W. Va. Code R. sections 110-15-33.4, 110-15-60.1, and 110-15-107.

[14] Streamlined Sales Tax Governing Board, "Streamlined Sales Tax Governing Board Meeting Minutes" (Oct. 6, 2021).

[15] Streamlined Sales Tax Governing Board, "Streamlined Sales Tax Governing Board Meeting Minutes" (Oct. 6, 2022).

[16] Petition for Resolution and Reconsideration, Business Advisory Council (May 15, 2023).

[17] Letter from Alison Jares, Streamlined Sales Tax Governing Board Compliance Review and Interpretations Committee chair, to Sen. Tim
Reed (R), Streamlined Sales Tax Governing Board President (Oct. 5, 2023).

[18] Streamlined Sales Tax Governing Board, "Streamlined Sales Tax Governing Board Meeting Minutes" (Nov. 8, 2023).